BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ARTHUR A. BUTLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 106,194
JET TV	)	
Respondent	)	
AND	)	
	)	
AMERICAN STATES INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an October 3, 1997, Order for Additional Medical Services entered by Assistant Director Brad E. Avery. The Appeals Board heard oral argument on April 1, 1998.

APPEARANCES

William R. Stewart of Topeka, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board considered the record listed in the Assistant Director's order. The Board also considered the deposition of Sherwood Smith, dated January 5, 1992; the deposition of Ralph Thomas Cooke, dated June 26, 1992; the deposition of David R. Hobbs, dated August 26, 1992; and, the deposition of Kevin Glassel, dated May 22, 1997.

ISSUES

This is a post-award application for medical benefits. The issues to be considered by the Appeals Board are the same as those considered by the Assistant Director. Claimant seeks a handicapped accessible van with a wheelchair lift and certain modifications to his new home to be ordered paid by respondent as medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, for the reasons stated below, the Appeals Board finds that the October 3, 1997, Order for Additional Medical Services entered by Assistant Director Brad E. Avery should be affirmed.

Respondent argues that the Appeals Board is without jurisdiction to decide the issues concerning medical treatment because this is an appeal from a preliminary hearing award under K.S.A. 1997 Supp. 44-534a. This matter did come before the Assistant Director pursuant to claimant's Form E3 Application for Preliminary Hearing. The parties agree, however, that all of the evidence that either party intends to submit on the issues has been submitted. Furthermore, the parties did not use the abbreviated evidentiary procedures allowed for preliminary hearings. *See* K.A.R. 51-3-5a. Accordingly, the Appeals Board considers the Assistant Director's order to be a final order and appealable under K.S.A. 1997 Supp. 44-551(b)(1) and not subject to the limited review provisions for a preliminary order under K.S.A. 1997 Supp. 44-551(b)(2)(A).

Claimant was severely injured in 1981 when he was shot five times during a holdup. As a result, claimant has lost the use of his lower extremities, has respiratory and heart problems, and has urinary and bowel dysfunction.

At the time of his injury, claimant was divorced and was living in an apartment with his daughter. She is now an adult and no longer resides with her father. In the time that has passed since the injury, however, claimant has remarried and fathered another child. He and his family have moved several times. In 1994 claimant and his family were living in a first-floor handicapped accessible apartment in Overland Park, Kansas. Claimant and his wife decided they would prefer living in a single family residence. A home was purchased and now claimant seeks to have respondent pay for making certain modifications to his residence to accommodate his special needs.

Obviously, claimant's catastrophic injuries have likewise caused claimant to incur catastrophic medical costs. It appears claimant and respondent, through its insurance carrier, have been able to work together and cooperate in many respects to ensure claimant is provided with appropriate and necessary medical care. Unfortunately, that same degree of cooperation and coordinated effort was not present when it came to the purchase of the single family residence. The result is that claimant now has an $80,000 home that he seeks to have remodeled at the respondent's expense to the extent of an additional sum in excess of $100,000. Respondent has agreed to provide some, but by no means all, of the requested items and modifications.

The Assistant Director, in his order, attempted to divide the modifications requested into two categories: (1) those modifications necessitated by claimant's use of a wheelchair and (2) those that he described as "dictated by convenience and lifestyle and/or those necessitated by the needs of other members of his family." The Assistant Director's order then lists seven modifications to claimant's home that are found to be compensable.

Respondent does not dispute those seven items. Therefore, they will be ordered paid by respondent as reasonable medical necessities.

The remaining items were not ordered paid by the Assistant Director because he found they were either items not necessitated by the claimant's use of a wheelchair or they were modifications dictated by convenience, lifestyle, or needs of other family members. Claimant disputes those findings and asks that the Board order those remaining modifications be paid for by respondent.

The problem with trying to separate what is a reasonable medical necessity from what is dictated by convenience and/or lifestyle is that these two categories can sometimes overlap. That is particularly true in this case because claimant's paraplegia renders difficult many daily activities that most people take for granted. Furthermore, the claimant's mental or emotional health is an important medical goal in and of itself and it can also be a significant part of an individual's physical health. Thus, the line between medical necessity and lifestyle becomes blurred and at times is nonexistent. Nevertheless, as the Assistant Director pointed out, citing Hedrick v. U.S.D. No. 259, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997), respondent cannot reasonably be held responsible for all the expenses associated with the accommodations that claimant's disability may require. Some modifications, while easily justifiable as related to claimant's disability, may nonetheless be outside the coverage of the Workers Compensation Act. The Board cannot require respondent to provide more than what is provided for in the Act, even where the request addresses what could be considered a basic need.

K.S.A. 44-510(a) (1981) requires the respondent to provide all reasonable and necessary medical treatment.

> It shall be the duty of the employer to provide the services of a physician, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, as may be reasonably necessary to cure and relieve the employee from the effects of the injury. All fees, transportation costs and charges under this section shall be subject to regulations by the director and shall be limited to such as are fair and reasonable. The director shall have jurisdiction to hear and determine all disputes as to such charges and interest due thereon.

But the Appeals Board will not engage in speculation or conjecture concerning what may or may not be reasonably necessary to relieve claimant from the effects of his injury in the absence of expert medical testimony. The Appeals Board will also not substitute its judgment on claimant's medical needs for the expert medical opinion testimony in the record.

The record contains testimony from three authorized treating physicians: Kale C. Gentry, M.D.; George Varghese, M.D.; and, John W. Weigel, M.D.

Kale C. Gentry, M.D., is an Overland Park, Kansas, physician, board-certified in family practice. He first saw claimant July 18, 1986, for a thrombosed hemorrhoid condition that was surgically relieved. At that time claimant was primarily walking with crutches, but occasionally using a wheelchair. Dr. Gentry has continued to be one of claimant's authorized treating physicians, although he has depended upon specialists in the various disciplines for most of claimant's conditions such as his heart, neurological, and, to a certain extent, the bladder, kidney, and colon problems.

Dr. Gentry's testimony notes that the gunshot wound to claimant's heart requires medication to prevent superventricular tachycardia, and the spinal cord injury and resulting paraplegia cause problems in addition to loss of use of claimant's legs. For example, the bladder and colon problems require claimant to catheterize himself intermittently and take medication to reduce leaking urine. Nevertheless, any physical activity, including coughing and sneezing, tends to make claimant lose urine.

Dr. Gentry testified that claimant's condition has worsened to the point where he can no longer use crutches and he now requires a wheelchair all of the time. Dr. Gentry was asked for his opinion on what home modifications were necessary now that claimant was using a wheelchair.

> Q. . . . Is there any particular special design or architectural designs that need to be considered to make life better for these category of people [paraplegics] around their home? . . . I'm asking how this would affect those people in the pursuit of their life around their home on a day-to-day basis as it relates to special needs that you would know about.
>
> A. . . . He would certainly need doors wide enough to get the wheelchair through. He should be in a one level house and he would require a wheelchair ramp to get to the automobile and out of the house. . . . He would need a wheelchair, a bathroom that would accommodate a wheelchair. He would need handles on the wall to lift himself out of the wheelchair onto the potty, into the bathtub.

Dr. Gentry also testified that physical activity could gradually make any arthritic condition in the upper back and cervical area worse.

> Q. . . . how would you remedy the physical activity that would have a propensity to cause that problem for somebody like Mr. Butler?

> A. I guess you'd have to have somebody chauffeur him around and put his wheelchair up for him. . . . A van with a wheelchair lift would solve that problem.

Dr. Gentry's recommendations were for (1) a van with a wheelchair lift; (2) widening the doors in claimant's home; (3) a wheelchair accessible bathroom; and (4) a ramp. But Dr. Gentry agreed that claimant had not specifically complained to him about his upper extremities recently and agreed that although claimant does have arthritis in his neck, he had not complained to him about that affecting his arms. Dr. Gentry was not shown any architectural drawings, blueprints, or other construction plans for his review, comment, or approval. Neither was he asked to comment upon any of the recommendations by the vocational and rehabilitation witnesses.

George Varghese, M.D., is a physician and member of the faculty at the University of Kansas Medical Center specializing in the field of physical medicine and rehabilitation. This field includes the evaluation and treatment of patients with major disabilities including spinal cord injuries and chronic pain. Dr. Varghese takes an interdisciplinary approach to address whatever the patients might need to get to their maximum level of function within the limits of their disability. The field also includes making recommendations concerning what adaptations are necessary for the patient to function within the limits of their disability, including the physical home environment and the needs of the patient for mobility and independence. He said mobility is a very important part of the treatment for a patient with a spinal cord injury not only psychologically but also functionally and physiologically. He described claimant as functioning independently at wheelchair level but with three main problems: pain; bladder problems; and bowel problems. Functioning independently at the wheelchair level means that the patient can transfer from bed to wheelchair and wheelchair back to bed or from toilet to wheelchair and also can negotiate the wheelchair up and down hallways or streets.

Unlike Dr. Gentry, in preparing his August 1, 1990, report, Dr. Varghese had the benefit of reports from other experts, including: a report by Dr. Melvin Karges, a physiatrist at Research Medical Center; a report by Kansas Rehabilitation Clinical Consultants; a report by David Hobbs, an architectural engineer; and, a report from The Whole Person Incorporated. Dr. Varghese was asked to review the recommendations from the architect for making claimant's home handicapped accessible. He qualified his recommendations by saying that he was not an engineer or architect but did have general recommendations to make based upon his knowledge of what it takes for someone in a wheelchair to function. Dr. Varghese's recommendations included: wider doors; wider hallways; more room in the bathroom and kitchen; a roll-in shower; an extra sink in the bathroom for cleaning his bag for bowel management; and he recommended parallel bars for claimant to do exercises at home. Access to the basement for emergency shelter in the case of tornados was also recommended as was a sidewalk to the back yard and a specially modified van with a lift. Dr. Varghese testified that the lift was necessary because the patient lifting himself in the wheelchair into and out of the van causes wear and tear on the arms and back leading to

joint and tendon problems. The strain required in exiting and entering a van can also cause a small amount of urinary leak.

As to all these recommendations, he was asked:

> Q. Is it your opinion, Dr. Varghese, that these items that you've told us about are medically necessary for Mr. Butler?
>
> A. Everything I mentioned, except for one qualification I would make, which is about the basement. That is for emergency purposes. Everything else I stated here are medically necessary.

He subsequently added: "It is my opinion that these recommendations are needed to minimize his [claimant's] functional deficits as a result of the spinal cord injury."

Upon cross-examination, however, Dr. Varghese clarified that his recommendations were not specific to the residence claimant currently occupies. Instead, they were given in anticipation of claimant making a move to Florida in 1990. Dr. Varghese was not familiar with the specific dimensions in claimant's present residence and, therefore, was not knowledgeable of whether claimant could pass through the doors or turn around in the rooms and hallways in his wheelchair. If claimant cannot, then the house is not accessible. With respect to the recommendation for the roll-in shower, Dr. Varghese conceded that if modifications to the bathroom would allow a direct transfer from claimant's wheelchair to a shower seat, then those modifications would be sufficient so long as claimant's shoulders and arms stay good. With regard to his recommendation for a van with a wheelchair lift, Dr. Varghese conceded that a wheelchair caddy would serve the same purpose as a wheelchair lift if it mechanically functioned properly and claimant did not have to ambulate beyond transfer from the wheelchair to the van. He was asked: "if such devices were available, there's nothing from a medical standpoint that would preclude Mr. Butler from obtaining transfer from the wheelchair to the vehicle and have the wheelchair mechanically stored," to which Dr. Varghese responded "there's no medical contraindication . . . for him to use that."

Dr. Varghese was not consulted concerning the remodeling of claimant's present residence. But some of the recommendations Dr. Varghese supplied claimant in 1990 were implemented in the current structure. As to access to a back yard, Dr. Varghese considered that to be very beneficial emotionally as well as a safety factor with respect to the care of claimant's child. With regard to the medical necessity for access to the back yard, Dr. Varghese admitted "it was not an absolute must, but it is something good to have."

John W. Weigel, M.D., is a urologist at the University of Kansas Medical Center. He first saw claimant December 22, 1994, in consultation with Dr. Varghese. His testimony centers primarily upon claimant's problems with bladder, sphincter, bowel, and kidney function. His testimony supports that given by Dr. Varghese to the effect that claimant

would have urine leakage with straining or anything that increased his intra-abdominal pressure such as with lifting. Transferring from his wheelchair or doing anything involving heavy physical effort could cause this. He concurred with Dr. Varghese about claimant's need for a wheelchair lift to reduce this stress incontinence. But Dr. Weigel was unable to elaborate concerning the specific type of wheelchair lift needed. He "just wanted to get him [claimant] into a situation where he doesn't have to strain to physically lift that wheelchair up in there and anything that's going to allow him less heavy effort would benefit him."

Based upon the testimony of the medical experts and the statements of respondent's counsel during oral argument agreeing to same, the Appeals Board finds that the home modifications awarded by the Assistant Director should be affirmed but that none of the additional modifications requested by claimant can be ordered as medically necessary.

We now turn to claimant's other request, specifically the van.

K.S.A. 44-510(a) (1981) requires respondent to provide transportation to and from medical treatment. It does not specify the method and respondent is free to determine the method of transportation. It does not require respondent to furnish claimant with a personal motor vehicle. Moreover, the Kansas Court of Appeals has held that a personal motor vehicle is not medical treatment under K.S.A. 44-510(a). In Hedrick v. U.S.D. No. 259, the Court of Appeals accepted an appeal from a preliminary hearing order in which the Administrative Law Judge had awarded claimant reimbursement for a portion of the cost of a vehicle. In that case, Ms. Hedrick had suffered a hip injury and the authorized treating physician recommended she obtain a larger vehicle, which would allow her easier access. Ms. Hedrick testified that, as a result of her injury, she was unable to get in and out of her present vehicle. The Appeals Board refused to review that preliminary order on an appeal from a preliminary hearing because it was not a final order and it did not raise one of the jurisdictional issues listed in K.S.A. 44-534a. In so finding, the Appeals Board determined that the order for the vehicle fell within the jurisdiction given the Administrative Law Judge to make orders concerning medical care at a preliminary hearing. The Court of Appeals disagreed and found the Administrative Law Judge had exceeded his jurisdiction in making the order because the motor vehicle did not constitute medical treatment or a medical apparatus under K.S.A. 44-510(a). In dicta, however, the Court added a proviso to the effect that its holding might be different had claimant's injury resulted in paraplegia. The Court did not explain this distinction. The Board now finds itself in the position where it must fashion an interpretation of that statute consistent with the holding in Hedrick. Accordingly, the Board finds that the van itself is not medical treatment or a medical apparatus, and, therefore, cannot be ordered paid by respondent. The costs associated with making the van handicapped accessible, however, do fit the definition of medical apparatus. Furthermore, respondent has agreed to furnish the wheelchair lift apparatus and other conversion costs if claimant provides the van. Given this concession by respondent, the Board makes this its order. Accordingly, the award entered by the Assistant Director with respect to the van is affirmed.

To a certain extent what the parties are requesting on appeal is clarification or explanation of the Assistant Director's order. The Board believes that this can better be accomplished at the trial court level and will not attempt to improve upon the Assistant Director's order beyond a review of what benefits the Board considers are legally required by the Act, in addition to the benefits upon which the parties have agreed.

Also, respondent has requested a lien or mortgage against claimant's home for the value of the modifications it is providing. That request is denied. But these modifications should be taken into consideration should claimant move again and again request that these same or similar modifications be made to another residence. Furthermore, any apparatus or medical device which becomes obsolete, is replaced, or which claimant for any reason no longer has need of should be returned to respondent if it can be reasonably removed without causing damage or unreasonable disfigurement to the residence or vehicle as the case may be.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order for Additional Medical Services entered by Assistant Director Brad E. Avery dated October 3, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William R. Stewart, Topeka, KS
Matthew S. Crowley, Topeka, KS
Brad E. Avery, Assistant Director
Philip S. Harness, Director